United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4204

To be argued by
STANLEY H. WALLENSTEIN

In The

United States Court of Appeals

For The Second Circuit

TIM LOK,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

CASES CITED

ADMINISTRATIVE DECISIONS CITED

STATUTES CITED

MISCELLANEOUS REFERENCES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1976

Docket No. 76-4204

TIM LOK,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR PETITIONER

Statement of the Issues

I

Whether the Board of Immigration Appeals erred in holding that the petitioner was ineligible to apply for the discretionary relief made available in Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

II

Whether the Board erred in holding that the

seven year period of domicile, required for eligibility under Section 212(c), must have been accumulated after the granting of permanent resident status.

Statement of the Case

This is a petition for review of a final order of deportation entered by the Board of Immigration Appeals on July 30, 1976. In that order the Board held that the petitioner was ineligible to apply for the waiver of exclusion contained in Section 212(c) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1182(c), and ordered that he be deported to Taiwan. The Board's holding was based on its interpretation of Section 212(c) as requiring a seven year period of domicile in the United States following the grant of permanent resident status. In line with that interpretation, this petitioner, who has resided in this country for seventeen years, was found ineligible under the statute, because his permanent resident status dated only from 1971.

On this petition for review the petitioner contends that the Board's interpretation of Section 212(c) is erroneous, and that eligibility to apply for the waiver contained in Section 212(c) can be premised on a seven year period of domicile in this country, even if a portion of it precedes the grant of permanent resident status.

This Court has subject matter jurisdiction over this petition for review pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105a(a).

Statement of the Facts

The petitioner, Tim Lok, is an alien, and a native of China. He was admitted to this country for a temporary period of time as a crewman on July 27, 1959. He has resided here since that date and, in fact, has been physically present here for all that time save for a two month absence in 1971.

In 1965 the Immigration and Naturalization Service (INS) commenced deportation proceedings on the ground that he had overstayed his admission (G. 109).[1/] On October 26, 1965, an immigration judge entered an order granting him voluntary departure within such time as the District Director shall direct. The order provided that if he were to fail to depart as required, that he be deported to Hong Kong (G. 108).

Following the entry of the order, a private bill was introduced in Congress on Tim Lok's behalf. As a result, he received several notices from the INS informing him that his permission to remain in the country was being extended (G. 103-107). The last extension shown in the administrative record was to March 2, 1969 (G. 103).

1/ References preceded by the letter "G" refer to pages of the administrative record filed by the Government. References preceded by the letter "A" refer to pages of the petitioner's appendix.

Meanwhile, on February 23, 1968, while in voluntary departure status, Tim Lok married his present wife, Wai Chan Lok, a naturalized citizen of the United States (G. 80). Thereafter on February 3, 1969, Wai Chan Lok filed a visa petition with the INS on Tim Lok's behalf (G. 66). The visa petition sought to have Tim Lok classified as an immediate relative of a United States citizen for immigration purposes.[2/]

The District Director approved the visa petition on January 30, 1970 (G. 66), and forwarded the approved petition and the supporting documents to the United States Consulate in Hong Kong where Tim Lok was to apply for his permanent resident immigration visa (A. 4). Because he had entered in 1959 as a crewman, Tim Lok could not adjust his status in the United States but had to apply to an American Consulate outside the country for a visa.[3/]

During this time, while the Consulate was processing his visa application, the INS took no steps to require Tim Lok to leave the country, even though his last extension of voluntary departure ended on March 2, 1969. In fact, by letter dated April 16, 1970 (A. 5) the Consulate in Hong Kong requested Tim Lok to have his status in the United States verified by the INS as a prerequisite to their processing his visa application. The letter was endorsed by the INS on

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2/ Immediate relatives of United States citizens may be admitted to the United States as permanent residents without regard to quota limitations. Section 201(b) of the Act, 8 U.S.C. § 1151(b).

3/ Section 245 of the Act, 8 U.S.C. § 1255, which permits adjustment of status in this country, does not apply to aliens whose last entry was as a crewman.

August 10, 1970, which noted that the Consulate had been informed of Tim Lok's status, and that Tim Lok had been provided with certain documents which he would have to return to INS upon his leaving the country (A. 5).

On October 25, 1971, Tim Lok left for Hong Kong to apply for his permanent resident visa in accordance with the instructions previously given by the Consulate (A. 6, 7). While he was away, the deportation section of the INS, having received notice of his departure, issued a warrant of deportation against him on November 16, 1971 (G. 100), and noted on its records that Tim Lok had effected his own deportation on October 25, 1971 by leaving the country (G. 101).

Because he was now considered by the INS as having deported himself, Tim Lok needed special permission from the Attorney General before he could obtain his immigration visa.[4/] An application for that special permission was submitted to the INS in New York by Tim Lok's attorney on November 22, 1971, and it was granted seven days later (G. 102). Tim Lok was then issued his immigration visa by the Consul in Hong Kong on December 17, 1971, and he returned to the United States on December 26, 1971 on which date he was admitted as a permanent resident (G. 61).

Thereafter, in 1973 Tim Lok was convicted on a plea of guilty of offenses relating to possession and distribution of narcotic drugs (G. 52). Following the conviction and as a

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4/ Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17), provides that aliens who have been deported are thereafter excludable unless they obtain special permission from the Attorney General to apply for admission.

result of it, the INS commenced deportation proceedings against him (G.48).

The deportation hearing was held on April 21, 1975 (G. 30-39). At the hearing Tim Lok sought to apply for the waiver of exclusion contained in Section 212(c) of the Act, 8 U.S.C. 1182(c) (G. 26). The application, had it been accepted and considered, would have been based on hardship to his citizen wife and his three stepchildren (G. 41).

The immigration judge in his decision of May 29, 1975 (G. 22-28), rejected Tim Lok's Section 212(c) application, finding him ineligible to apply for such relief for several reasons. One reason was that Tim Lok had been deported in October of 1971 and the statute only applies to an alien who "temporarily proceeded abroad voluntarily and not under an order of deportation" (G. 25, 26). Another reason was that Tim Lok's residence here prior to December 1971 "would not be considered to be legal" (G. 26) and he was thus not an alien returning to a lawful unrelinquished domicile of seven years. Another reason was that because of his conviction, Tim Lok was ineligible for voluntary departure or suspension of deportation (G. 27). The final reason put forth was that Tim Lok was ineligible because "his legal status in the United States did not begin until 1971" (G. 27). Having declined to consider the application, the immigration judge proceeded to order Tim Lok's deportation to Taiwan (G. 28).

5/ Aliens convicted of a narcotics violation are excludable under Section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23), and deportable under Section 241(a)(11), 8 U.S.C. § 1251(a)(11).

Tim Lok then appealed to the Board of Immigration Appeals which, in a decision entered July 30, 1976, dismissed the appeal (G. 9-11, A. 1-3). The Board cited one ground in support of its conclusion that Tim Lok was ineligible to apply for the Section 212(c) waiver. The Board held that under the statute, the requisite seven year period of domicile in the United States must have followed the grant of admission as a permanent resident. As Tim Lok's status as a permanent resident dated only from 1971, the Board held that he did not satisfy the seven year requirement and was therefore ineligible to apply for relief (G. 11, A. 3).

This petition for review, which seeks review of the Board's order, followed.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 212, 8 U.S.C. § 1182:

* * * *

> "(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a). Nothing contained in this

subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under Section 211(b)."

A R G U M E N T

THE BOARD'S CONCLUSION THAT TIM LOK WAS INELIGIBLE TO APPLY FOR RELIEF UNDER SECTION 212(c), PREMISED ON ITS HOLDING THAT SECTION 212(c) APPLIED ONLY TO ALIENS WHO HAVE BEEN PERMANENT RESIDENTS FOR SEVEN YEARS, MUST BE SET ASIDE AS NEITHER THE LANGUAGE OF THE STATUTE NOR ITS LEGISLATIVE HISTORY SUPPORT THAT HOLDING.

a. Introduction

Whether the Board is correct in holding that Section 212(c) is limited to aliens who have been permanent residents for seven years, or whether we are right when we say it is not so restrictive, raises a question of statutory interpretation. With such a question before it, this Court's goal is, of course, to effectuate the intention of Congress. Araya v. McLelland, 525 F.2d 1194,1195 (5th Cir. 1976). To reach this end, the appropriate starting point should be the literal meaning of the words used in the statute itself. Flora v. United States. 357 U.S. 63,65 (1958). Often the words are sufficient in and of themselves to determine the purpose of the legislation. When such is the case, the legislation must be interpreted as it exists and there is no need

to go further. United States v. American Trucking Association, 310 U.S. 534,543 (1940). On the other hand, if the wording of the statute is unclear and ambiguous, or leads to an absurd or unreasonable interpretation, then resort should be made to the legislative history of the statute and other aids of statutory construction. United States v. Second National Bank, 502 F. 2d 535 (5th Cir. 1974).

We will follow that route in the course of this brief, first discussing the statutory language and then the legislative history. Before doing that, however, it will be well at this point to comment briefly on what we think the contentions of both parties will be.

The INS will most surely concede that the answer cannot be found solely in the wording of the statute itself, but will rely on its legislative history. That much is clear from a reading of the Board's decision in this case (A. 1-3). In its decision, the Board gives no discussion of the statute nor does it set forth any rationale for its holding. It simply states its holding, that Section 212(c) requires a seven year period of domicile following the grant of permanent resident status, and cites as its authority a twenty-three year old administrative decision, Matter of S, 5 I&N Dec. 116 (1953). A reading of that aged administrative decision shows that the INS's interpretation of Section 212(c) is based in toto on Section 212(c)'s legislative history.

Our position on the other hand, is that the answer can be found in the plain wording of the statute. We will show that the statute is clear and unambiguous in the sense that it contains no requirement that an alien be a permanent resident for seven years. We acknowledge that the statute applies only to aliens "lawfully admitted for permanent residence," and requires "a lawful unrelinquished domicile of seven consecutive years." We will show, however, that those quoted phrases have different meanings and cannot equate to a requirement of seven years as a permanent resident. Thus, there would be no reason to go further. We will, however, proceed to show that the legislative history relied on by the INS in support of its restrictive view actually supports our view that Congress never intended to limit Section 212(c)'s applicability to aliens who have had permanent resident status for seven years.

It is best, at this point, to make some preliminary observations on the section of law involved here. Section 212(c) contains the broadest and most comprehensive waiver provision in the entire Immigration and Nationality Act. It permits a waiver of every ground of excludability, save those pertaining to subversives.[6/] It is, in fact, the only section of the Act which permits a waiver of a narcotic-type violation. Aliens qualified to seek the waiver must necessarily have

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6/ Section 212(a) of the Act, 8 U.S.C. § 1182(a) contains thirty-one grounds of exclusion. All of them can be waived under Section 212(c) except subsections 25 through 29, which relate primarily to subversives and to nonimmigrants without documents.

lived here at least seven years, a considerable amount of time. Thus, the provision is a humanitarian one whose manifest purpose is to ameliorate hardship in the case of excludable and deportable aliens who have lived here long enough to obtain strong roots and ties in this country. As a humanitarian statute, it should be broadly constructed to effectuate its purpose, see Brennan v. Keyser, 507 F.2d 472,477 (4th Cir. 1974), and that canon of statutory construction necessarily runs throughout this argument.

It is also well to note that whatever the eventual decision in this case, the INS can hardly be the loser. Tim Lok stands to lose much because if the Board's interpretation is upheld, then there is nothing in the way of his deportation. On the other hand, if the Board's interpretation of Section 212(c) is rejected, all that Tim Lok wins is the right to present his case to the Attorney General. Whether Tim Lok should be granted the waiver is always within the discretion of the Attorney General. Thus, the effect of holding that Tim Lok is eligible to apply for relief under Section 212(c), really has the effect of enlarging the Attorney General's authority.

We now turn to examine Tim Lok's eligibility to apply for the waiver, considering first the statutory language.

b. The statutory language contains no requirement that an applicant be a permanent resident for seven years.

By its language, the statute applies to "aliens lawfully admitted for permanent residence..." Thus, it is clear enough that an applicant for the waiver must have been admitted as a permanent resident. But it is not clear at all that he must have had that status for seven years or for any particular period of time. To the contrary, we think it clear that there is no requisite time period involved so far as permanent resident status goes because the statute does not specify any time period in that respect. To be sure, the statute does specify a seven year time period, but it does that in a context quite separate and distinct from the requirement of permanent resident status.

The statute describes the eligible permanent resident alien as one who is returning to a "lawful unrelinquished domicile of seven consecutive years". Thus, the seven year time requirement is not descriptive of the period of time for which an alien must have been "lawfully admitted for permanent residence". It is descriptive of the period of time for which an alien must have a "lawful unrelinquished domicile". And the two quoted phrases, "lawfully admitted for permanent residence", and "lawful unrelinquished domicile", do not have the same meaning.

The phrase "lawfully admitted for permanent residence" is a defined term under the Act. It is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed". Section 101(a)(20) of the Act, 8 U.S.C. § 1101(a)(20). As the phrase has a definite, set meaning in the Act, it cannot mean the same thing as "lawful unrelinquished domicile".

The term "lawful unrelinquished domicile" is not defined in the Act. Thus, the phrase should be interpreted in accordance with its ordinary meaning. Unless there are strong reasons for believing that the legislature meant an ordinary word to have a special meaning, the proper method is to follow the normal common understanding. See Malat v. Riddell, 383, U.S. 569 (1966); Richards v. United States, 369 U.S. 1, 9 (1962).

We turn then to the dictionary to define if we can, the phrase "lawful unrelinquished domicile". The word "lawful" is defined as "conformable to law", "allowed or permitted by law", and "often comes close to permissible".[7/] The word "domicile" is defined as a "persons place of residence", "the place of his permanent and principal home or of his

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7/ Websters Third New International Dictionary, 1967 ed., p. 1279.

last such home if he has not yet acquired a new one". And of course, the ordinary meaning of the word unrelinquished, is "not given up" or "not surrendered".

Thus, as best we can put it, the phrase, "lawful unrelinquished domicile", given its ordinary meaning, would mean a person's principal home, allowable and permissible under law, which he has not given up and to which he always intends to return. We are not certain of what the exact contours of this definition may be in an immigration sense. We are certain, however, that it does not have the same meaning as "lawfully admitted for permanent residence". This is necessarily so, because under our immigration laws, an alien may have a "lawful unrelinquished domicile" here even if he has never been "lawfully admitted for permanent residence", and we will show this by example.

Under our laws, an alien may come to this country in a nonpermanent capacity for an extended or indefinite period of time, as for example, a student, a treaty trader, a representative of a foreign government, or an intra-company transferee.[8/] Such an alien, after coming, may well abandon his foreign residence and maintain his home here as his only residence with no fixed intention of leaving. At least so long as he is in the status in which he was admitted, his presence here must be considered lawful.

8/ Id. at p. 671.

9/ Section 101(a)(15) of the Act, 8 U.S.C. § 1101(a)(15) provides for the admission of twelve classes of non-immigrants.

As he has no other home, and no intention of abandoning his residency here, he would have an unrelinquished domicile here. Thus, even though such an alien may not have the status of permanent resident, he comes within the statutory phrase of having "lawful unrelinquished domicile".

Even if an alien comes here in a nonpermanent status, and even if he becomes deportable by abandoning that status or by overstaying his authorized time, he still may have a "lawful unrelinquished domicile" here. The INS can give voluntary departure to such an alien and can give it for extended or indefinite periods of time. See Noel v. Chapman, 508 F. 2d 1023 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3201. And the INS has a nonpriority program by which it permits aliens, even those under orders of deportation, to remain here indefinitely or permanently. See Lennon v. INS, 527 F.2d 187,190 n. 6 (1975). Such aliens, even though they have no legal status, are here lawfully in the sense that their presence here is "allowable or permissible." And their residence must be considered as their domicile as they have no intention of abandoning it and no other home to return to. Thus, even though such aliens may not be "lawfully admitted for permanent residence," they may nevertheless, have a "lawful unrelinquished domicile" here.

Another example, and perhaps the clearest one, is the alien who comes here, lawfully or unlawfully, and seeks asylum or refugee status. Such an alien, if he qualifies,

can be granted refugee status under the terms of treaty or under our immigration laws. See Zamora v. Immigration and Naturalization Service, 534 F.2d 1055(2d Cir. 1976). He may well spend the rest of his life here in that status. By definition, as a refugee, he has no other home to which he can return. Thus, his residency here must be considered his domicile. His status here as a refugee is, of course, a lawful one. He may never become an alien "lawfully admitted for permanent residence." Notwithstanding this, he would certainly be an alien with a "lawful unrelinquished domicile" here.

These examples are sufficient to show the distinction between the terms "lawfully admitted for permanent residence" and "lawful unrelinquished domicile." They show that under our laws an alien may accumulate years of "lawful unrelinquished domicile" here even though he may not have been "lawfully admitted for permanent residence." This illustrates that under Section 212(c) it makes no difference how long an applicant has had the status of permanent resident. Certainly an alien who has been a permanent resident for over seven years will satisfy the statutory requirement of "lawful unrelinquished domicile of seven consecutive years." But he is not the only one who can satisfy the statutory requirement. Under the examples we have given, which are by no means inclusive, an alien can satisfy that statutory requirement even if he has been a permanent resident for only two years.

It is a rule of statutory construction that all parts of the statute must be read together, neither taking specific words out of context, United States v. American Trucking Association, Inc., 310 U.S. 534,542-543 (1940), nor interpreting one part so as to render another meaningless. Helvering v. Morgan's Inc., 293 U.S. 121 (1934). Our construction, which assigns different meanings to the phrases "lawfully admitted for permanent residence" and "lawful unrelinquished domicile" comports with this rule. The Board's interpretation, however, equates these two phrases in the sense that only a permanent resident of seven years can have a "lawful unrelinquished domicile" of seven years. This interpretation would result in giving both phrases the identical meaning, and such an interpretation should be avoided, if possible. Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961).

What we have presented is sufficient to show that under the plain wording of Section 212(c), seven years of permanent resident status is not a requirement of eligibility. As the wording of the statute is clear in this regard, there is in our view, no need to go further. Nevertheless, because the INS relies on the legislative history of Section 212(c) to support its view, we now turn to disucss that history and we will show without question that it supports our position.

c. The legislative history illustrates that Congress did not intend to limit Section 212(c) to aliens who had been admitted for permanent residence for seven years.

Whatever significant legislative history there is concerning Section 212(c) is set forth in the Board's decision in Matter of S, 5 I&N Dec. 116 (1953). We shall limit our discussion to that, as it is that decision and the history discussed therein upon which the Board premised its holding in Tim Lok's case.

The predecessor to Section 212(c) was the so-called Seventh Proviso to Section 3 of the Immigration Act of 1917, 3 Stat. 874, which read as follows:

> Provided further, (7) That aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe.

For purposes of easy comparison we set forth the statute in its present form. Section 212(c) provides that:

> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraphs (30) and (31) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b).

There are two significant differences in phraseology between the Seventh Proviso and the present law. The Seventh Proviso applied to aliens generally, while the present law is limited to aliens "lawfully admitted for permanent residence." And the Seventh Proviso required an "unrelinquished United States domicile of seven consecutive years." The present law changes this by inserting the word "lawful" before the words "unrelinquished domicile" and by dropping the words "United States."

The difference in phraseology alone, while significant, does not support the notion that the present law requires seven years of permanent residence, nor did the Board in Matter of S think it did. Thus, the Board turned to the legislative background of the new law as expressed in a Senate and House Report.

The Board observed that in Senate Report No. 1515 81st Cong., 2d Sess. (April 20, 1950), at p. 384 the following language appeared:

> The suggestion was made that if the words "established after a lawful entry for permanent residence" were inserted in the 7th proviso to qualify the domicile of the alien it would effectively eliminate practically all of the objectionable features, and at the same time the Attorney General would be left with sufficient discretionary authority to admit any lawfully resident aliens returning from a temporary visit abroad to a lawful domicile of 7 consecutive years.
>
> The subcommittee recommends that the proviso should be limited to aliens who have the status of lawful permanent residence who are returning to a lawful domicile of 7 consecutive years after a temporary absence abroad.

Continuing on, the Board noted the following comment as it appeared in House Report No. 1365, 82d Cong., 2d Sess. (February 14, 1952) at p. 51:

> Under present law, in the case of an alien returning after a temporary absence to an unrelinquished United States domicile of 7 consecutive years, he may be admitted in the discretion of the Attorney General under such circumstances as the Attorney General may prescribe. Under existing law the Attorney General is thus empowered to waive the grounds of exclusion in the case of an alien returning under the specified circumstances even though the alien had never been lawfully admitted to the United States. The comparable discretionary authority invested in the Attorney General in section 212(c) of the bill is limited to cases where the alien had been previously admitted for lawful permanent residence and has proceeded abroad voluntarily and not under order of deportation.

Basing its decision on these two comments, the Board in Matter of S, concluded that the language of Section 212(c) "mean(s) that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence." 5 I&N Dec. at 118. The decision, however, is silent as to what particular wording in those comments supports its conclusion. This we think is understandable because as we read those comments, we see nothing to support that restrictive view.

To the contrary, what we do see (particularly in the Senate Report) is the clearly expressed intention of Congress not to require seven years domicile subsequent to lawful admission for permanent residence. The Senate Report notes the

suggestion of adding the words "established after a lawful entry for permanent residence" to the new law as qualifying the domicile of the alien. Had these words been added, the present Section 212(c) would now read "lawful unrelinquished domicile of seven consecutive years established after a lawful entry for permanent residence." Had that been the case, and the statute enacted that way, then we would have no quarrel with the Board's decision. The suggestion, however, obviously was not accepted and the statute was not enacted that way. Thus, what we learn from the Senate Report is that Congress considered the option of limiting the waiver to aliens who had completed seven years of permanent residence, and that Congress knew the words to employ if they intended to so limit it. But we see from the language of Section 212(c) that Congress did not use those words. This, we think, well illustrates that Congress had no intention of limiting the Section 212(c) waiver to alien's having completed seven years' permanent residency.

Our conclusion is supported by reference to other sections of the Act. Thus, in the portion of the Act applying to naturalization, Congress provided in Section 316(a) of the Act, 8 U.S.C. § 1427(a), that a petitioner for naturalization must have "resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years...." The same language was employed in Section 319(a) of the Act, 8 U.S.C. § 1430(a), relating to

the naturalization of the spouse of a United States citizen, except that the period of required residency following lawful admission for permanent residence is reduced to three years. These sections of law illustrate that when Congress intends to premise eligibility on a period of residence in this country, accumulated following a lawful admission for permanent residence, it has no difficulty in doing so and it does so quite explicitly.

The conclusion must follow, that while Congress intended to change the Seventh Proviso by limiting the waiver to "alien's lawfully admitted for permanent residence," it did not intend to limit it to aliens who had accumulated seven years residence following such admission. There is, we suggest, nothing absurd or unusual about Congress premising a benefit on the status of permanent residency, with an accompanying time period of residency, separate and distinct from the permanent residence status. Congress did just that, for example, in providing for Medicare Insurance for aliens. Pursuant to 42 U.S.C. § 1395o, an alien over 65 is entitled to benefits providing he is "lawfully admitted for permanent residence" and provided he "has resided in the United States continuously during the five years immediately proceeding the month in which he applies for enrollment..." See Matthews v. Diaz, 44 U.S.L.W. 4748 (1976).

The conclusion we reach is in harmony with the basic purpose of the statute. That purpose is to ameliorate hardship in the cases of eligible aliens who have lived here for such a time that they are likely to have established deep

roots and strong ties in the United States. But the roots and ties to this country that a long term resident is likely to establish have no necessary relationship to the amount of time he may have been a permanent resident. They are likely to come into existence simply by virtue of his long term presence here. Thus, an alien who has lived here seven years, all of them as a permanent resident, is likely to develop strong roots and ties. But an alien who has lived here seventeen years, only five of them as a permanent resident, is just as likely to establish the same roots and ties. Tim Lok's case is an example of that. Thus, our reading of Section 212(c) can hardly be said to lead to an absurd or an unreasonable result. In fact, we suggest that Congress may well have had these considerations in mind when it declined to include a requirement for a seven-year period of permanent residence in Section 212(c).

d. Tim Lok's residence in this country should be considered lawful within the meaning of Section 212(c).

Thus far, we have shown that eligibility for the Section 212(c) waiver does not require a seven year period of domicile following lawful admission for permanent residence. The statutory language contains no such requirement and the legislative history shows a definite intent not to make it so restrictive. Thus, there can be no doubt but that the

Board's holding in this case was based on an incorrect understanding of the law, and therefore cannot be affirmed.

This, however, does not necessarily end the case. Section 212(c) requires a "lawful unrelinquished domicile of seven consecutive years." We have earlier given some examples as to how an alien may accumulate time of "lawful unrelinquished domicile" even though he may not yet have been "lawfully admitted for permanent residence." Such an alien would be eligible for the waiver even though he has completed less than seven years as a permanent resident. But Tim Lok does not fall within any of these examples.

This leads us to what we think is the real issue in this case, that being whether Tim Lok's residence in this country, or at least a sufficient portion of it, can be considered as "lawful unrelinquished domicile" within the meaning of Section 212(c). This was always the issue in the case and it existed regardless of how much or how little time he had as a permanent resident. And this issue is what the Board should have decided but never reached because of its erroneous interpretation of Section 212(c).

Recognizing that this issue is arguable, and that the administrative record may not be as complete as it should be for this purpose, we are reluctant to urge this Court to determine the issue de novo. The better method may be to defer to the Agency. In any event, we will now set forth reasons why we think that a sufficient portion of Tim Lok's

presence in this country could be considered "lawful unrelinquished domicile" within the meaning of the statute.

Determining Tim Lok's status here requires a brief review of the facts. He came here in 1959 as a crewman, overstayed his time and was given a deportation hearing in 1965. He was then given voluntary departure and ordered deported in the alternative. He was consistently under voluntary departure until March 1969 when it lapsed. In January 1968 he married a United States citizen who eventually filed a visa application for him. He remained here while it was being processed, and after approval it was sent to the appropriate consul. He continued living here until he was invited to the consulate in Hong Kong to formally apply for his visa. He left for the consulate in October 1971. While he was away, the INS issued a warrant of deportation, and noted on its records that he had deported himself. Then the INS promptly granted him permission to reapply for admission and he returned with his permanent resident visa in December, 1971.

What his status was up until 1968 is not relevant to the case. The deportation hearing at which he applied for the Section 212(c) waiver was on April 21, 1975. Thus, for purposes of eligibility under Section 212(c), it is only necessary to consider his status from April 21, 1968.

Undoubtedly, the Government will argue that his presence here, at least until December of 1971, was unlawful, because he was under an order of deportation and was, in fact,

deported in October 1971. But the line between lawful and unlawful, at least in an immigration sense, is not at all so clear. Thus, in Senate Report No. 1515, when commenting on adjustment of status, the Committee on the Judiciary observed that:

> Legality of status is a matter of degree. Most aliens in this country are here lawfully for all purposes. A few are eligible for reentry documents, but do not have status sufficient for naturalization nor reentry documents, but still are not deportable; and many are subject to deportation, yet eligible to have that status changed without deportation.10/

Prior to February of 1968, Tim Lok was an overstay crewman, under voluntary departure, with an alternate order of deportation. His presence here until then may have been unlawful but even this is arguable.11/ But whatever his status then, it changed on February 23, 1968 when he married his citizen wife. It changed because at that point he acquired the basis on which to obtain permanent residence. Thus, while he may have been subject to deportation, he was an alien "eligible to have that status changed without deportation."

10/ Senate Report No. 1515, 81st Cong., 2d Sess. (April 20, 1950), p. 591.

11/ As he was under extended voluntary departure, his presence then may well be interpreted as not unlawful as he was here with the permission of the INS.

As best as we can tell from the record, the INS respected his changed status. Even though his voluntary departure time lapsed early in 1969, the INS made no attempt to deport him. Instead, the INS permitted him to remain here for almost four years while his petition was processed and until the Consulate was prepared to issue his visa. Thus, during all that time, Tim Lok's presence here was at least "allowable and permissible" so far as the INS was concerned. In our view, his presence here during that time can easily be considered as "lawful," at least when interpreting his status in the light of a humanitarian statute.

The Government may argue that Tim Lok's deportation in October of 1971 evidenced his unlawful status and in any event, prevented the seven year period of domicile from being consecutive. But Tim Lok was in fact, never really deported. He left this country in October 1971, not under any compulsion, on his own initiative, paying his own way, and only for the purpose of obtaining his visa. His deportation was accomplished after the fact simply by amendment of the INS's records. The INS had the authority to do this because an alien who is under an order of deportation and who leaves the United States may be considered as having been deported. Section 101(g) of the Act, 8 U.S.C. 1101(g).

Instead of considering Tim Lok to have been deported, the INS could just as easily have amended its records to show that he had left under voluntary departure. The District Director has this authority under 8 CFR § 244.2. This would

have been consistent with the INS's permitting him to remain here while his visa application was being processed. In any event, the only legal effect of considering him to be deported was to require him to obtain special permission to return. And of course, that special permission was promptly granted. Under these circumstances, Tim Lok's "deportation" can be viewed almost as a fiction.

This discussion illustrates that there are good grounds permitting a finding that Tim Lok satisfied the statutory requirement of "lawful unrelinquished domicile of seven consecutive years." At the very least, the issue is arguable. And the issue is a difficult one involving the application of immigration principles of law and policies.

Normally a court will not affirm agency action on a ground not relied on by the agency. SEC v. Chenery Corp. 318 U.S. 80 (1943). Thus, if this Court agrees that the Board's holding was wrong, it must remand. If this Court agrees that Tim Lok satisified the "lawful unrelinquished domicile" requirement, then it can hold that Tim Lok is eligible to apply for the waiver. Alternatively, if this Court is not so convinced, then it should remand to the Board to determine the issue. The Agency having the expertise is charged in the first instance with construing the statute it administers. Griggs v. Duke Power Co., 401 U.S. 424,433-34 (1971). As this court noted in Ferraro v. Immigration and Naturalization Service, 535, F.2d 208,209-10 (2d Cir. 1976) "in reviewing orders of administrative agencies charged with application of statutes regulating particular areas of control

(the courts) sometimes defer in doubtful cases to the views of the agency in the light of its presumed special experience and its supposed competence resulting from familiarity with the area." In Ferraro this Court remanded because the Board, just as it did here, failed to recognize and determine the issue in the case.

e. Prior judicial decisions

To our knowledge, there are no judicial decisions interpreting the portions of Section 212(c) relevant to this case. A recent decision by this Court contains a passage to the effect that since the petitioners were not permanent residents for seven years, Section 212(c) is clearly inapplicable. Guan Chow Tok and Pak Suen Stephen Lai v. Immigration and Naturalization Service, 538, F.2d 36,38 2d Cir. (1976). That passage, however, is dictum and not a part of the holding in the case. In fact, the issue of Section 212(c)'s applicability was not briefed or argued in the case. Thus, that decision should have no bearing here and this case must be considered as one of first impression.

Some guidance, however, can be gained from this Court's holding in Francis v. Immigration and Naturalization Service, 532 F.2d, 266 (2d Cir. 1976). Francis was concerned with a different portion of Section 212(c) and was decided on equal protection grounds. Nevertheless, the decision in Francis and the administrative decisions preceding it gave some insight as to how this statute should be construed.

On its face, Section 212(c) appears restricted to aliens who have physically left the country and who are returning. This is perhaps, the clearest and most restrictive portion of the statute. The INS, however, has given this apparent restriction a most generous interpretation. In Matter of Smith, 11 I&N Dec. 325 (1965), the Board held that Section 212(c) could be granted in a deportation proceeding to an alien even though he is not physically returning to the country. The Board reasoned that because the alien could apply for status adjustment under Section 245 of the Act, 8 U.S.C. § 1255, he can be analogized to a person making a ficitional entry. Thus, by the use of a beneficial fiction, the Board extended eligibility under Section 212(c) to a large class of aliens.

The Board, however, stopped short of extending eligibility to those aliens who were ineligible to apply for status adjustment under Section 245. Thus, in Matter of Arias-Uribe, 13 I&N Dec. 696 (1971), the Board declined to extend eligibility to a native of the Western Hemisphere on the ground that he had not departed the country.[12/] This interpretation of the statute was affirmed by the Ninth Circuit in Arias-Uribe v. Immigration and Naturalization Service, 466 F.2d 1198 (1972), and in Dunn v. Immigration and Naturalization Service, 499 F.2d 856,858(9th Cir. 1974), cert. denied, 419 U.S. 1106 (1975).

12/ Natives of the Western Hemisphere are inelgible to apply for status adjustment under Section 245 of the Act, 8 U.S.C. § 1255.

In Francis, the alien was a native of the Western Hemisphere who was ineligible for status adjustment and who never left the country. The INS denied relief on the ground that he was not returning to this country. On review, this Court reversed, holding that it was irrational to distinguish between permanent residents who had left the country and returned and those who had not left.

While Francis was decided on equal protection grounds, its practical effect is to completely eviscerate from the language of the statute, the requirement that an alien be physically returning to this country following an actual departure. As a result of Francis, the INS now interprets Section 212(c) as not requiring a departure and return in any case. Matter of Silva-Ovalle, INS File #A-8 745 827 (BIA, Sept. 10, 1976).

This generous and humane interpretation of Section 212(c) stands in stark contrast to the position the Board has taken in this case. In the Francis situation, the Board, with help from this Court, has completely eliminated an explicit restriction from the statute. On the other hand in this case, the Board strains to read into the statute a restriction which is just not there.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE GRANTED, AND THE MATTER SHOULD BE REMANDED TO THE BOARD OF IMMIGRATION APPEALS WITH INSTRUCTIONS TO CONSIDER TIM LOK ELIGIBLE TO APPLY FOR WAIVER. ALTERNATIVELY, THE MATTER SHOULD BE REMANDED TO DETERMINE WHETHER TIM LOK SATISIFIES THE REQUIREMENT OF LAWFUL UNRELINQUISHED DOMICILE OF SEVEN CONSECUTIVE YEARS.

Respectfully submitted,

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STANLEY H. WALLENSTEIN

- Of Counsel -

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIM LOK,
Petitioner- Appellant,

- against -

UNITED STATES OF AMERICA,
Respondent- Appellee,.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N. J. 07083

That on the **5th** *day of* **November** *19***76** *, deponent served the annexed*

Brief *upon* **Robert B. Fiske Jr.** *attorney(s) for*

Respondent- Appellee *in this action, at* **One St. Andrews Plaza, New York, New York**

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this **5th**
day of **November** *19* **76**

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Print name beneath signature

EUGENE L. ST. LOUIS